No. 87-1122

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1987

CROWLEY MARITIME CORPORATION, et al.,
*Petitioners,*

v.

SHEREEN RAMONA ZIPFEL, et al.,
*Respondents.*

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## INTRODUCTION

Petitioners Crowley Maritime Corporation, Brinkerhoff Maritime Drilling Corporation, Brinkerhoff Maritime Drilling Corporation S.A. and Brinkerhoff Maritime Drilling Corporation PTE, Ltd. (collectively "Crowley"), respectfully submit this Supplemental Brief pursuant to the provisions of Supreme Court Rule 22.6. Crowley's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is dated and was filed December 23, 1987. It was docketed by the Supreme Court on January 4, 1988 as action No. 87-1122, and is currently pending. The petition presents two questions, the first concerning the propriety of a federal court injunction and the second concerning the impact of this Court's reasoning in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) on the applicability of *forum non conveniens* in a Jones Act case (46 U.S.C. § 688). This Supplemental Brief concerns itself only with the second question, and

Crowley files it to call the Court's attention to the new Fifth Circuit cases of *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876 (5th Cir. 1987) and *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988).

**THESE RECENT FIFTH CIRCUIT CASES CONFIRM THE CONFLICT WITH THE NINTH CIRCUIT REGARDING FORUM NON CONVENIENS ANALYSIS IN A JONES ACT CASE**

As noted on page 4 of Crowley's petition, after receipt of the Ninth Circuit's original decision herein (*Zipfel v. Halliburton Co.*, 820 F.2d 1438 (9th Cir. 1987)), Crowley, by way of a timely petition for rehearing and rehearing en banc, called the Ninth Circuit's attention to the then-recently decided Fifth Circuit en banc decision of *In Re Air Crash Disaster Near New Orleans, Louisiana*, 821 F.2d 1147, 1164 n. 25 (5th Cir. 1987) ("*Air Crash*"). *Air Crash* is contrary to the Ninth Circuit's position that *forum non conveniens* has no role in a Jones Act case. Furthermore, Crowley noted that the Fifth Circuit had been persuaded by the reasoning of Judge Schwarzer in the *Zipfel* district court opinion (*sub nom. Sherrill v. Brinkerhoff Maritime Drilling*, 615 F.Supp. 1021 (N.D. Ca. 1985)) regarding the impact of *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) on the Jones Act/*forum non conveniens* issue. Crowley also advised the Ninth Circuit that *Air Crash* disapproved and overruled the earlier Fifth Circuit authority that had been heavily relied upon by the Ninth Circuit herein in reaching its contrary *forum non conveniens* conclusion.

Notwithstanding the foregoing, the Ninth Circuit denied the petition for rehearing but did acknowledge the *Air Crash* case in a footnote which was added to its republished decision (*see, Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486 n. 9 (9th Cir. 1987)). In that footnote, the Ninth Circuit declined to follow the *Air Crash* case and noted that the Fifth Circuit change of position on the Jones Act/*forum non conveniens* issue was "signaled" in a footnote by a "divided en banc panel of the Fifth Circuit, with Judges Garza, Johnson, Garwood and Higginbotham not joining in the footnote . . . " Further, the Ninth Circuit stated in that footnote that "*Air Crash* was not a Jones Act case." The addition

of footnote 9 to the *Zipfel* opinion below was the extent of the Ninth Circuit's discussion of the *Air Crash* case. The Ninth Circuit declined to consider the reasoning of Judge Schwarzer in the district court below or of the Fifth Circuit concerning the impact of *Piper Aircraft Co. v. Reyno, supra*, on a maritime personal injury case brought under U.S. law.

Respondents assert that the reasoning of the Fifth Circuit in *Air Crash* should be ignored because the Fifth Circuit's maritime law/*forum non conveniens* language is mere dicta contained in a footnote. However, the new and subsequent Fifth Circuit decisions establish beyond question that the intent of *Air Crash* was to follow this Court's lead in *Piper Aircraft Co. v. Reyno, supra*, and state a fundamental and significant doctrine of maritime law. Furthermore, there can be no doubt that the Fifth Circuit's position regarding maritime *forum non conveniens* is in complete opposition to that of the Ninth Circuit.

In *Gonzalez v. Naviera Neptuno A.A., supra*, a unanimous panel (including Judge Higginbotham who had declined to join footnote 25 of the *Air Crash* decision) recognized that it was "[b]ound by the decision of the en banc court that there is no need for a different analysis in maritime cases" regarding *forum non conveniens*. 832 F.2d at 877.

The *Gonzalez* court continued:

> *Air Crash* directs us away from the tortuous detours taken in recent years by maritime jurisprudence back to the straight and narrow (or straighter and narrower) path set out by *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981).
>
> *Id.* at 878.

Similarly, the unanimous Fifth Circuit panel in the very recent decision of *Camejo v. Ocean Drilling & Exploration, supra*, (including Judge Johnson who had declined to join the *Air Crash* footnote 25) also recognized that *Air Crash* was more than mere dicta; rather, it affirms that the maritime law in the Fifth Circuit now follows *Piper*. At 838 F.2d 1378, the *Camejo* opinion charac-

terized the previous rule regarding the non-applicability *forum non conveniens* to Jones Act cases as the "old law" that has now been changed by *Piper*. The Fifth Circuit specifically disassociated itself from the Ninth Circuit on this issue by its reference (at 838 F.2d 1379 n. 14) to the Ninth Circuit case of *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1479 (9th Cir. 1986). At page 1379 of its decision, the *Camejo* panel described the *Air Crash* case as setting forth the "new law" and referred to the same as a *holding* of the Fifth Circuit.

Any litigant in the Fifth Circuit attempting to disregard the new law of *Air Crash* on the grounds urged by respondents herein or suggested by the Ninth Circuit (i.e., that *Air Crash* was merely dicta) will be doomed to failure because those judges have clearly closed ranks and have given notice to litigants of exactly what the law of the Fifth Circuit is regarding maritime *forum non conveniens*. By the same token, Crowley submits that it is superficial and unrealistic to argue (as respondents do herein) that there is no real conflict on this important doctrine between the Fifth and the Ninth Circuits. On the contrary, today two of the leading and busiest maritime circuits in the United States are at complete odds with each other on a question as fundamental and far-reaching as the proper role of *forum non conveniens* in a maritime personal injury case. Literally hundreds of cases a year are and will continue to be affected by this unsettled state of the law. Any injured maritime worker who can make a colorable claim that his case would be governed by U.S. law if heard here is well-advised to file his action in the Ninth Circuit where *forum non conveniens* is inapplicable, and avoid the Fifth Circuit and the Second Circuit where the *forum non conveniens* doctrine is applied. *See, also, Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983). Crowley respectfully urges that this Court resolve the existing conflict among the circuits by adopting a uniform rule regarding the impact of *Piper Aircraft Co. v. Reyno, supra*, on maritime personal injury claims and *forum non conveniens*.

## CONCLUSION

For the foregoing reasons, petitioners have filed this Supplemental Brief in support of their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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